

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 29 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN OSANITSCH,

Plaintiff - Appellant,

v.

MARCONI PLC,

Defendant - Appellee.

No. 06-15437

D.C. No. CV-05-03988-CRB

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted May 16, 2008
San Francisco, California

Before: RYMER and BEA, Circuit Judges, and DUFFY^{**}, Senior District Judge.

John Osanitsch sued Marconi, PLC and its subsidiary, Marconi Acquisition Sub., Inc., in Sonoma County Superior Court. Marconi removed the action to the

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

Northern District of California. Osanitsch moved to remand, which the district court denied, and Marconi moved to dismiss based on an injunction previously entered by the Bankruptcy Court for the Southern District of New York pursuant to 11 U.S.C. § 304, which the district court granted. Osanitsch appealed. We vacate the dismissal order, and remand.

While the district court correctly resolved one of the jurisdictional issues before it – whether the injunction itself precluded Marconi from removing or made its removal premature – the court did not explicitly determine whether the removal petition was timely in light of when, and upon whom, service was effected. As Marconi acknowledged at oral argument, the record is not fully developed on this point. The issue also appears to be fact-dependent and may present a novel question of which rule, the first-served rule or the last-served rule, is applicable. Accordingly, to facilitate appellate review, and because the district court is in a better position to address these matters in the first instance, we remand for it to make a definitive ruling on the timeliness of removal and, thus, on its jurisdiction.¹

As federal jurisdiction is not yet settled, we decline to give an advisory opinion on the propriety of the dismissal. Without expressing any view on the

¹ We do not understand there to be any dispute over the presence of diversity or the adequacy of the amount in controversy.

merits, however, we must vacate the order as it is not clear there was jurisdiction when it was entered.

During the pendency of this appeal, as contemplated by the district court, Osanitsch requested relief from the bankruptcy court having jurisdiction over the § 304 proceeding. That court ultimately entered an order which may, or may not, have an effect on whether a live controversy continues with respect to the dismissal order, and as to its validity. If the district court determines that jurisdiction was timely invoked, we leave it to the parties to assert in district court whatever position with respect to supervening events they believe is appropriate.

VACATED AND REMANDED.